



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: HC-NLD-CIV-MOT-ALP-2020/00004

In the *ex parte* application of:

LAMECK MUKONDOMI

APPLICANT

For leave to be admitted and to be authorised to practise as a legal practitioner.

Neutral citation: *Ex parte: Mukondomi* (HC-NLD-CIV-MOT-ALP-2020/00004)
[2020] NAHCNLD 89 (20 July 2020)

Coram: ANGULA DJP

Heard: 29 June 2020

Delivered: 20 July 2020

Flynote: Applications and motions – Application for admission as legal practitioner – Requirement for domicile and consequently for admission to permanent residence in Namibia as required by Legal Practitioners Act, 1995 s 4(1)(c)(ii) not satisfied.

Immigration Control Act, 7 of 1993 – Section 22(1)(c) read with (a) – Same requirement set out in Constitution of the Republic of Namibia – Article 4(3) – Requirement of marriage in good faith to a Namibian not satisfied.

Summary: This is an *ex parte* application for leave to be admitted and authorised to practise as legal practitioner of this Court. The applicant married his Namibian wife

on 31 January 2020 and six days thereafter signed the founding affidavit filed in support of this application. The applicant relied on his marriage for acquiring domicile in Namibia. The applicant failed to allege that his marriage to his Namibian wife was entered in good faith. That failure alarmed the Court. The Court, concerned that the applicant may be falling short of satisfying the requirement of s 4(1)(c)(ii) of the Legal Practitioner's Act ordered that the applicant file heads of argument on this point. The Court further requested the Law Society of Namibia to designate a legal practitioner to act and assist the Court as *amicus curiae*. Ms Mugaviri was so designated and acted as *amicus curiae*.

Held; the applicant did not satisfy the requirement of s 22(c) of the Immigration Control Act, 7 of 1993 read with Article 4(3) of the Constitution of the Republic of Namibia by alleging that his marriage to a Namibia citizen was in good faith through which he alleged he acquired domicile and for that reason failed to comply with s 4(1)(c)(ii) of the Legal Practitioner's Act, 15 of 1995.

Accordingly, the application was dismissed.

ORDER

1. The application is dismissed.
2. The matter is removed from the roll and is finalised.

RULING

ANGULA DJP:

Introduction

[1] This matter concerns an application by the applicant for leave to be admitted and to be authorised to practise as a legal practitioner of this Court.

[2] On 18 May 2020 when the applicant appeared in person and moved his application for admission, I conveyed to him my concern whether he qualified for admission having regard to the requirement of s 4(1)(c)(ii) of the Legal Practitioners Act, Act No. 15 of 1995 (LPA). I ordered him to file heads of argument to address the court's concern. I also ordered that the Law Society to designate a legal practitioner to act as *amicus curiae* and to that effect to file heads of argument and to appear on the date of hearing to assist the Court. I then postponed the matter to 29 June 2020 for hearing of the arguments on the issue mentioned.

[3] Ms Mugaviri was designated by the Law Society to act as *amicus curiae*. She dutifully filed heads of argument and appeared on the date of the hearing and presented arguments. The Court wishes to express its appreciation for her valuable assistance rendered to the Court.

[4] The applicant did not appear in person anymore, instead Ms Samuel appeared on his behalf and had likewise filed heads of argument. I should mention that Ms Samuel was the principal of the applicant under whom he served his contract of attachment.

[5] Initially the applicant only stated in his founding affidavit that he is a male Zimbabwean citizen; that he is lawfully married to his Namibian wife and as such he has acquired domicile in Namibia through marriage. Following the postponement of the matter, after the Court raised its concern as indicated above, he filed a supplementary affidavit in which he augmented his founding affidavit by stating that as a consequence of the said marriage he has been lawfully admitted to Namibia for permanent residence alternatively that he is ordinarily resident in Namibia within the meaning of s 4(1)(c)(ii) of the LPA. He went on to say that for those reasons he is exempted from being in possession of a work permit as required by s 27 of the Immigration Control Act, Act No. 7 of 1993, (ICA) and accordingly he has satisfied the requirement of s 4(1)(c)(ii) of the LPA.

Applicable statutory provisions

[6] It is necessary to quote s 4(1) of the LPA in order to provide context:

‘4. Persons qualified to be admitted as legal practitioners and application for admission:

(1) Subject to the provisions of this Act, the Court shall admit and authorise to practise as a legal practitioner any person who, upon application made by him or her, satisfies the Court that he or she -

- (a) is a fit and proper person to be so admitted and authorised;
- (b) is duly qualified in accordance with the provisions of section 5; and
- (c) (i) is a Namibian citizen; or
(ii) has been lawfully admitted to Namibia for permanent residence therein and is ordinarily resident in Namibia; or
(iii) is the holder of an employment permit issued in terms of section 27 of the Immigration Control Act, 1993 (Act 7 of 1993) for the purpose of employment in the service of the State.’ (Underlining supplied for emphasis)

[7] As indicated earlier herein, the only issue which concerned the Court was whether the applicant has been lawfully admitted to Namibia for permanent residence. The Court was satisfied that the applicant met the requirements of ss (1) (a) and (b). It was common cause that (c)(i) and (iii) do not find application.

[8] Ms Samuel argues in her written submissions that by virtue of his marriage to his wife, a Namibian citizen, the applicant ‘meets and satisfies the requirements of s 4(1)(c)(ii)’. She relies for this submission on the judgment of this Court in *Miller & Another v The Law Society of Namibia*.¹

[9] Ms Mugaviri argues contrariwise and points out that the *Miller* matter is not applicable to the facts of the present matter for two reasons. First the applicant made no allegation that he entered into the marriage with his Namibian wife ‘in good faith’. In the *Miller* matter the applicants made allegations that their marriage to their Namibian husbands had been entered into in good faith. Secondly, in that matter allegations were made by the applicants, and it was common cause, that the

¹ NLLP 2002 (2) 328 NHC 9 April 2001.

applicants were permanently resident in Namibia whereas in the present matter no such allegation has been made by the applicant.

[10] Before I consider counsel's submissions, I think it would be helpful to the reader to follow the argument having regard to the facts in the *Miller* matter. The facts were briefly as follows:

'The applicants were both South African citizens married to their husbands, who are citizens of Namibia. They applied to be admitted and authorised to practice as legal practitioners in Namibia. The applicants stated in their respective founding affidavits that they have been lawfully admitted to Namibia in terms of s 4(1)(c)(ii) of the LPA in that they married their Namibian citizens in good faith and were living together with their husbands and there they were domicile in Namibia as envisaged by s 2(1)(b) of the ICA. Accordingly, it was not necessary for them to have permanent residence permits in order to comply with s 4(1)(c)(ii) of the LPA.'

[11] The Court found that the applicants were permanently resident in Namibia and that they had been married to their respective husbands in good faith. The Court held that with reference to s 2(1) of the ICA, since the applicants were domiciled in Namibia and therefore exempted from limitations of entry in Namibia with a permanent residence permit, work permit, students' permit and visitors' permit, they were not required to be holders of permanent residents permits because those requirements are dealt with by Part V, s 26 of the Act.

[12] In the present matter the applicant's case is that he acquired domicile through marriage to his wife who is a Namibian citizen. In the light of this claim it is necessary to have regard to the relevant provision of the ICA. Section 22(1)(c) read with (a) of the ICA deals with acquisition of domicile in Namibia through marriage. It provides as follows:

- '(1) For the purposes of this Act, no person shall have a domicile in Namibia, unless such person –
- (a) is a Namibian citizen;
 - (b) is ordinarily resident in Namibia, whether before or after the commencement of this Act, by virtue of a marriage entered into with a

person referred to in paragraph (a) in good faith as contemplated in Article 4(3) of the Namibian Constitution.’ (Underlining supplied for emphasis)

[13] Article 4(3) of the Constitution, which is mentioned in s 22(1)(c) above, provides for the acquisition of Namibian citizenship through marriage. It reads as follows:

- (3) The following persons shall be citizens of Namibia by marriage:
- (a) Those who are not Namibian citizens under sub article (1) or (2) hereof [ie by birth or by decent] and who:
 - (aa) in good faith marry a Namibian citizen, or prior to the coming into force of this Constitution, in good faith married a person who would have qualified for Namibian citizenship if this Constitution had been in force;
 - (bb) subsequent to such marriage have ordinary resided in Namibia as the spouse of such person for a period of not less than ten (10) years; and
 - (cc) apply to become citizens of Namibia.’ (Underlining supplied for emphasis)

[14] It is to be noted that both the Constitution and the ICA state that for a non-Namibian to qualify for the acquisition of Namibian citizenship through marriage and domicile through marriage that marriage must have been entered into in good faith.

[15] Ms Mugaviri correctly points out that the applicant failed to allege that his marriage to his Namibian citizen wife had been entered into good faith as required by both Article 4(3)(a)(aa) of the Constitution and s 22(1)(c) of the ICA. Ms Samuel submits that the applicant’s case ‘finds abode and residence’ in the *Miller* case. The applicants in the *Miller* case however made specific allegations that they were married to their Namibian husbands in good faith whereas in the instant matter the applicant did not make such allegation.

[16] In my judgment the applicant's failure to allege that his marriage to his Namibian wife had been entered in good faith is fatal to his application. The applicant can only acquire domicile through marriage if he has entered into the marriage with his Namibian citizen wife in good faith. It cannot be assumed that simply because the applicant entered into a marriage with a Namibian citizen, such marriage was entered into in good faith as per the dictates of the Constitution and the ICA. The applicant is required to satisfy the Court on a balance of probabilities that his marriage was entered into in good faith. Good faith is a fact which the applicant has to allege in order to prove that he is domiciled in Namibia. It is a fact which must be alleged and in the absence evidence to the contrary that allegation becomes a proven fact.

[17] I was unable to find a discussion of the concept 'good faith' in case law in the context of Article 4(3) read with s 22 of ICA. Having given it considerable thought, I am of the view that it means: marriage to a Namibian citizen by a non-Namibian with a fixed and settled intention 'to create a physical, moral and spiritual community of life – *a consortium omnis vitae*'.² It might also include the intention 'to found a family' as per Article 14(1) of the Constitution. One of the duties flowing from the marriage relationship is the duty to live together as husband and wife. Any agreement to contract out of that duty would be against public policy.³

[18] The converse of a marriage in good faith, I think, is a marriage of convenience, entered into with ulterior motive by a non-Namibian person to a Namibian citizen and without any intention whatsoever to create *a consortium omnis vitae* but solely for that non-Namibian person, to derive benefits from that marriage such as, but not limited to, acquiring domicile, or permanent residence, and/or citizenship through that marriage. Such a marriage is not entered into in good faith.

[19] In my view, there are factors which call into question the element of good faith of the marriage of the applicant. The applicant was issued with the certificate by the Board of Legal Education on 13 January 2020 certifying that he has satisfactorily undergone legal studies. About seventeen days thereafter the applicant entered into marriage on 31 January 2020 at Windhoek, according to the marriage certificate. Six days thereafter the applicant signed the founding affidavit in these proceedings on 6

² Hahlo: The Law of Husband & Wife p 130, 5th Edition.

³ Hahlo (ibid).

February 2020, at Windhoek. The wife also signed her confirmatory affidavit on the same day before the same Commissioner of Oaths. The present application was filed on 14 February 2020. The neck-breaking speed at which the matters moved from the date of the solemnisation of marriage to the filing of the present application raises a reasonable doubt in the mind of a reasonable person about the motive behind the marriage. It is to be noted in this connection that without the applicant being married to a Namibian citizen through which he acquired domicile, he would not have qualified to be admitted as legal practitioner.

[20] Further factors which the Court found rather puzzling and remain unexplained are; the fact that the applicant and his newly-wedded wife are not residing together as husband and wife. On the applicant's own version he is residing at Ondanjokwe hospital, an intermediate health facility situated in the newly proclaimed town of Oniipa, in Oshikoto Region. From his papers he does not say that he is a nurse neither or a medical doctor. He is unemployed. The confirmatory affidavit filed by the applicant's wife does not deal with good faith requirement of the marriage. She simply deposed to the fact that she is self-employed as a marketing consultant. She further states that she has read the applicant's affidavit 'and confirm the content thereof to be true and correct in so far as it relates to me'. In this connection, Ms Mugaviri correctly points out that the applicant further failed to state how long he has been residing with his wife or why they are residing in different towns nor did he make any allegations relating to the state of affairs of his marital relationship.

[21] Ms Samuel took issue with what she labelled as the Law Society and Ms Mugaviri's 'impeachment' of the applicant's marriage without any factual basis and without affording the applicant an opportunity to properly deal therewith. Counsel's argument is misplaced and misses the basis of the applicant's case. I say this for the following reasons: In the first place, this is an *ex parte* application. There are no respondents. The Law Society is not a party to this proceedings. It did not make the statement attributed to it by counsel. Ms Samuel further misconstrued Ms Mugaviri's role in the present proceedings. She is not representing the Law Society. As mentioned earlier in this judgment, she was designated by the Law Society at the Court's request to assist the Court as *amicus curiae*.

[22] The basis of the applicant's application is founded on domicile through his marriage to a Namibian citizen. Again as pointed out earlier in this judgment, the applicant was required to allege and prove that such marriage had been entered into in good faith. Ms Mugarivi, in performing her duty to the Court, was entitled to draw the Court's attention to factors which tend to suggest that the marriage might not have been entered into in good faith. It was incumbent upon the applicant to make out his case and to lay bare before Court all the facts which leave no doubt in the mind of the Court that his marriage upon which he relies for his domicile and therefore his application is a marriage entered into in good faith.

[23] In this connection this Court correctly observed in the *Law Society of Namibia v Kamwi*⁴:

'As the first respondent is an aspirant for admission into the legal profession it is as well that he is made aware, even though this is not the reason for the decision I am called upon to make, that the profession he wishes to enter has exacting standards of honesty and utmost good faith. Thus, if an aspiring legal practitioner's conduct of affairs and behaviour raise suspicions of a crucial nature, can it be said that that aspirant's character makes him a worthy member or candidate for the profession he wishes to join?'

[24] That question is imposed upon this court by the applicant's lack of candour. In this connection, I referred earlier to the absence of an explanation how long the applicant have been residing together as husband and wife subsequent to the marriage and why are they are currently residing in separate towns. Masuku J in *Ex parte Siambango*⁵ in his usual clarity of language and eloquence said the following with regard to an aspirant legal practitioner duty of disclosure which I fully associate myself with

'[43] It is important and in fact necessary that an applicant who applies to be admitted but knows that there has been a lapse in conduct expected of members or potential members of the honourable profession, that this disclosure must be made fully and frankly by the said applicant, without being prodded, reminded or requested to disclose same. Where an applicant fails or neglects to take the court in his or her confidence that has a negative effect on his or her fitness to be admitted.

⁴ 2005 NR 91 (HC) at p 96.

⁵ *Ex parte Siambango* 2020 (1) NR 162 (HC).

[44] This is so for two reasons. First, in all *ex parte* applications, the law imposes on applicants what is referred to as *uberrima fides*, namely, utmost good faith. This requires the applicant to fully and frankly disclose all material facts that may have a bearing on the court granting or even refusing the order. This includes the disclosure of facts that may be inimical to the applicant's interests. Failure to so disclose, results in the court refusing the application, or where an interim order has been granted, for same to be discharged because of the hoarding of relevant information.⁶

[45] Secondly, legal practitioners and prospective legal practitioners, are, or will in due course become officers of the court and they are, in that special position, expected to make a completely clean breast to the court on all relevant matters that may even tangentially affect their fitness to be admitted and enrolled as officers of the court. In that regard, the court is entitled, because of their especial position, to act and rely on their word, without more.

[46] Where a prospective legal practitioner withholds germane and relevant information from the court at the point of moving an application for admission, he or she fails before the starting blocks and the court would be well within its rights to refuse the admission as the withholding of information reflects a serious defect in character, which is wholly unsuitable in officers of the court and it is tantamount to dishonesty.'

[25] As regard the complaint that the applicant has not been afforded an opportunity to explain the status of his marriage, I am of the view that it would be impermissible for the applicant to each time, an aspect of his marriage is questioned, request that the proceedings be adjourned so that he be afforded an opportunity to deal with that aspect. As a matter of fact, the applicant filed a supplementary affidavit when the aspect of his admission for permanent residence to Namibia was raised. The applicant set himself for scrutiny by the Court when he placed his application before Court with his marriage as a basis upon which he claims domicile and can hardly be heard to complain when hard and perhaps uncomfortable questions are asked about his marriage. The founders of our Constitution as well as the Legislature in their wisdom knew that not all marriages might necessarily be entered into in good

⁶ *Atlantic Management Proprietary Limited v Prosecutor-General of Namibia* (Case No. S/A 53/2017), para 34.

faith. They knew that some marriages might be entered for convenience. It is for that reason that the requirement of good faith is in the Constitution and in the ICA.

[26] The Court gained the distinct impression that the applicant approached this application in a casual manner. It is clear from the papers that he based his founding affidavit on a standard precedent for admission as a legal practitioner by a Namibian citizen with an exception that he is domiciled in Namibia by virtue of his marriage. The applicant overlooked the fact that not being a Namibian citizen he was required to place before Court all the facts relevant to his status as a person claiming admission as a legal practitioner based on domicile through his marriage.

[27] There is a further reason why the present application is distinguishable from the *Miller* case (*supra*) as correctly submitted by Ms Mugaviri. In that case the applicants made specific allegations that they had been living with their husbands permanently in Namibia on a continuous and uninterrupted basis since the respective dates of their marriages. No allegation to that effect has been made by the applicant in the present application.

[28] A further issue which has not been addressed by the applicant and which should have been addressed is this: It appears from the papers that the applicant obtained both his degrees from the University of Namibia during the years 2014 and 2016 respectively; and that he thereafter attended the Justice Training Centre. It stands to reason that he was admitted to Namibia through a study permit. It is not apparent from the papers whether or not he left Namibia after he had qualified and returned on visitor's permit. This aspect is relevant to determine his status at the time of his marriage. In other words was he lawfully residing in Namibia or was he a prohibited immigrant at that relevant time? As the Supreme Court held in *Getachew*⁷ matter that if a person continues to reside in Namibia after his permit has expired he is unlawfully in Namibia despite his subsequent marriage to a Namibian citizen because the marriage cannot result in such person being lawfully resident in Namibia. In other words if he was a prohibited immigrant at the time he entered into marriage then his status cannot be legalised by his subsequent marriage to a Namibian citizen even if the marriage was entered into in good faith. In my view, the

⁷ *Government of the Republic of Namibia v Getachew* 2008 (1) NR 1 SC at para 55.

applicant ought to have fully explained his status prior to his marriage. He failed to do so.

[29] I have therefore arrived at the conclusion that the applicant failed to make out a case that he is domiciled in Namibia. In the light of this finding it became unnecessary to inquire into the issue whether the applicant has been lawfully admitted to Namibia for permanent residence or whether he qualifies to be admitted as a legal practitioner of this Court.

[30] In the result, I make the following order:

1. The application is dismissed.
2. The matter is removed from the roll and is finalised.

H Angula
Deputy-Judge President

APPEARANCES:

APPLICANT: A M SAMUELS
 Of Kamuhanga Hoveka Samuel Inc.,
 Ondangwa

AMICUS CURIAE: G N MUGAVIRI
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